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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76- 76-571

JOHN T. CLARK & SON OF BOSTON, INC.,

and

AMERICAN MUTUAL LIABILITY INSURANCE CO.,
Petitioners,

v.

JOHN A. STOCKMAN

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the First Circuit entered in this case on July 27, 1976.

OPINIONS BELOW

This matter arises under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972. The Decision and Order of the Administrative Law Judge were entered on November 25, 1974, and appear at page 33a as Appendix C to this Petition.[1] The Decision of the Benefits Review Board of the Department of Labor affirming the Decision and Order of the Administrative Law Judge and dated July 30, 1975, appears as Appendix B hereto (A. 30a). The Opinion and Decree of the First Circuit Court of Appeals, dated July 27, 1976, affirming the Decision of the Benefits Review Board, have not been officially reported but are printed as Appendix A hereto (A. 1a, 29a). In addition, the opinion of another Court of Appeals in a relevant case not yet officially reported is printed as Appendix D hereto (A. 44a).

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on July 27, 1976 (A. 1a, 29a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act were intended to extend coverage to a shoreside "stripper" of containers whose duties do not include the typical longshoring activity of taking cargo on or off a vessel.

2. Whether the 1972 Amendments to the Act were intended to extend federal compensation coverage beyond the point where cargo is first unloaded onto an adjacent pier or similar facility.

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[1] All page citations to the Appendices to this Petition are hereinafter preceded by the designation "A".

3. Whether the "situs" and "status" requirements of the Act are met in the case of an employee who is injured while "stripping" a container unloaded from a vessel some days before and transported overland for two miles by truck to the place of the injury.

STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

Section 2(3), 86 Stat. 1251, 33 U.S.C. § 902(a):

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U.S.C. § 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a), 86 Stat. 1251, 1256, 33 U.S.C. § 903 (a):

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the

United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

STATEMENT OF THE CASE

This case arises out of an injury sustained by an employee of Petitioner John T. Clark & Son of Boston ("Clark & Son") at Clark & Son's Boston Army Base facility. The injured employee filed for workmen's compensation benefits under the federal Longshoremen's and Harbor Workers' Compensation Act, and Clark & Son contested the claim. Petitioner American Mutual Insurance Company is Clark & Son's insurer with respect to claims arising under the Act.

Clark & Son provides two distinct types of services at its Boston Army Base facility. The first is stevedoring —the typical longshoring activity of taking cargo on or off a vessel (CA A. 15, 16).[2] That activity was not involved in this case. The injury to Respondent Stockman occurred days after the vessel in question had been unloaded, and it occurred at a location far removed from the berth at which the unloading took place (CA A. 24).

Mr. Stockman's injury was incurred in connection with Clark & Son's other activity at the Boston Army Base facility: its terminal operation (CA A. 25-26). The terminal operation function is essentially similar to a warehousing operation (CA A. 16). It begins after a vessel has been unloaded, and it includes, among other

[2] "CA A." refers to the Appendix filed in the Court of Appeals, which includes, *inter alia*, the transcript of the hearing before the Administrative Law Judge.

things, the "stripping" (unloading) of containers[3] after they have been taken off a vessel and delivered by truck to the terminal (CA A. 16-17). Under a contract with Sea-Land Service, Inc. ("Sea-Land"), a major U.S. container vessel operator, Clark & Son performs this terminal operation service for Sea-Land at the Boston Army Base facility (CA A. 11-12). Mr. Stockman was injured on October 1, 1973, while "stripping" a Sea-Land container which had been delivered overland from the place of unloading to the Boston Army Base terminal by an independent trucking firm (CA A. 23-26).

The container in question had been unloaded from a Sea-Land vessel as much as three days before Mr. Stockman's injury occurred (CA A. 20, 24). The vessel was unloaded at Sea-Land's berth at Castle Island (Berth 17), and the containers remained at the berth awaiting further transshipment by truck (CA A. 24-25).

The immediate destination of containers taken off a vessel at Castle Island depends upon their contents. Containers carrying goods destined for a single consignee beyond the waterfront are ordinarily picked up by truck at the berth, delivered overland to the consignee, and "stripped" by employees of the consignee (CA A. 27-28). In this case, the Sea-Land container was discharged from the vessel and landed onto a chassis at Sea-Land's terminal. Several days later the container and chassis were hauled by an independent motor common carrier to the truck unloading platform at the Boston Army Base terminal, a distance of approximately two miles by land over the streets of Boston (CA A. 13-14, 20, 24-25). There the contents of the container were removed, placed on pallets, and brought down into the terminal ware-

[3] "Containers are rectangular metal structures used to transport cargo. After being taken off the vessel by crane, they are provided with a chassis and wheels and converted into large box trailers capable of being trailed on the highways by tractors" (A. 2a n. 1).

house building for further transshipment to individual consignees (CA A. 21, 25; A. 4a-5a).

At the time of his injury Stockman was engaged in his usual duties as a cooper or "extra dock laborer" [4] at the Boston Army Base (CA A. 19-20, 26). Stockman's duties at the Boston Army Base included a variety of different jobs, such as stuffing and stripping of containers, shifting cargo, and driving chisels.[5] (CA A. 19). There is no evidence in the record that Stockman's duties at Clark & Son require him at any time to work aboard ship, or to engage in the typical longshoring activity of taking cargo on or off a vessel. There is, therefore, no aspect of Stockman's employment with Clark & Son which would have been covered by the Act before it was amended in 1972.

This being the case, the effect of the decisions below in Stockman's favor is to extend coverage under the Act

[4] The contract between the International Longshoremen's Association and the Boston Shipping Association, in evidence below (CA A. 31), contains the following provision regarding "extra dock labor":

Article 18—Utilization of Extra Dock Labor

Extra dock labor shall be utilized for but not limited to the following purposes, coopering damaged cargo, palletization, container loading and unloading, and voluntary truck loading and unloading.

The employer has the right to assign the number of employees he selects and the place of employment at the terminal or pier.

The employer has the right to assign the employees at any time to another terminal under his control.

The consignee, shipper or his designee, shall have free choice in his selection of a loading or unloading agent, such loading or unloading including but not limited to trucks, railroad cars and lighters.

It is understood that further sorting that may be required after a vessel has completed its loading-discharging operation shall be performed by extra dock labor as an independent operation, at a time directed by the employer and shall not in any way be considered part of a gang operation.

[5] A chisel is a fork-lift truck commonly used in freight-handling.

not just to a new category of waterfront activities, but to a new category of waterfront employees—employees who under the unamended Act would not have been covered with respect to *any* of their activities. As discussed more fully below, whether the 1972 Amendments to the Act were intended to have such an effect is a question of great difficulty and of great importance to the stevedore and marine terminal industry.

The Administrative Law Judge and the Benefits Review Board did not address the general nature of Stockman's duties but simply found (1) that Stockman was engaged in maritime employment at the time of his injury and was thus an "employee" as defined by Section 2(3) of the Act, and (2) that the place of injury was "upon the navigable waters of the United States" as that term is defined in Section 3(a) of the Act (A. 33a, 30a).

The First Circuit affirmed, but in so doing stated that "[t]he most troublesome question" raised by the case was how to reconcile its holding with the Congressional intent to limit coverage of the 1972 Amendments to employees who would previously have been covered under the Act for part of their activity (A. 26a).

REASONS FOR GRANTING CERTIORARI

The decision below is one of a number of recent rulings by various Courts of Appeals [6] attempting to inter-

[6] *Pittston Stevedoring Corp.* v. *Dellaventura* (2d Cir. Nos. 1004, 1014, 1044, 1111, decided July 1, 1976, and printed in the Appendices to two Petitions for Writs of Certiorari filed in this Court and arising out of that decision: *Northeast Marine Terminal Co.* v. *Caputo*, No. 76-444 (hereinafter *"Caputo"*), and *International Terminal Operating Co.* v. *Blundo*, No. 76-454 (hereinafter "Blundo").

Sea-Land Service, Inc. v. *Director* (3rd Cir., No. 75-2039, decided August 5, 1976), printed at page 90a of the Appendix to the *Blundo* Petition (hereinafter *"Sea-Land Service"*).

[Footnote continued on page 8]

pret the controversial 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, and in particular Sections 2(3) and 3(a) of that Act, as amended, 33 U.S.C. §§ 902(a), 903(a).

The conflict in interpretation that has developed between various judges and various Courts of Appeals, as well as the importance and complexity of the questions presented,[7] have already been spelled out in the two previously filed Petitions for Writs of Certiorari in the *Caputo* and *Blundo* cases, *supra*. Therefore, the arguments in those Petitions as to why the granting of certiorari in one or more of those cases or in this one is of such paramount importance will not be repeated here. Suffice it to say that Petitioners adopt the arguments in those Petitions and urge the Court to end at the earliest

[6] [Continued]

ITO Corp. of Baltimore v. *Benefits Review Board*, 529 F.2d 1080 (4th Cir. 1975), Nos. 75-1051, 75-1075, 75-1196, decided *en banc* on August 26, 1976, and printed at page 113a of the Appendix to the *Blundo* Petition (hereinafter *"Benefits Review Board"*).

Jacksonville Shipyards, Inc. v. *Perdue*, (5th Cir.), Nos. 75-1659, 75-2833, 75-2289, 75-2317, 75-4112, decided September 27, 1976, and printed at page 44a in the Appendix to the instant Petition (hereinafter *"Perdue"*).

For a list of other pending cases involving the same questions, see the *Blundo* Petition, p. 10 n. 7.

See also *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 45 U.S.L.W. 3241 (U.S. October 4, 1976), which involved injuries on navigable waters rather than the shoreside injuries dealt with in the other recently decided cases.

[7] The court below, for example, conceded that this case raised "a difficult question of interpreting the 1972 amendments * * *" (A. 2a), that "the difficulty * * * arises from the essential ambiguity" of the amendments (A. 3a), that "judicial decisions to date * * * reflect a sharp difference of opinion over the reach of the Act" (A. 8a), that the various opinions have created a "judicial melange" (A. 9a), that because of "the importance of the question" and other factors, no Court of Appeals will probably have the last word in interpreting the Amendments (*id.*), and that Congress "has seemingly gone out of its way to avoid taking any express stance on the status of those engaged in stuffing and stripping containers * * *" (A. 22a).

possible time the confusion and uncertainty surrounding the 1972 Amendments.

They also urge the Court to adopt the conclusion of Judges Winter, Haynsworth and Russell in the Fourth Circuit's *Benefits Review Board* decision and of Judge Lumbard in the Second Circuit's *Caputo* and *Blundo* cases that coverage under the Act is extended to those engaged in longshoring operations when the injury occurs between the ship and, in the case of unloading, the first storage or holding area on a pier, wharf or terminal adjoining navigable waters, or, in the case of loading, from the last storage or holding area on the pier, etc., to the ship. We submit that the language of the Amendments, their legislative history, and the need for uniform treatment of employees under the Act all lead inevitably to this "point-of-rest" principle. Under such a principle, the Respondent Stockman in the instant case clearly would not be covered by the Act.

The ambiguities and anomalies created by the courts which have rejected the "point-of-rest" principle are well illustrated by the decision in this very case. For example, as to the "situs" test, the court below conceded that the statutory langage "suggests that Congress had in mind a terminal associated with the shipboard movement of marine cargoes". Yet the court went on to extend coverage to an injury that occurred nowhere near the vessel that had carried the cargo involved in the accident (A. 16a). Under this theory, the "situs" test could be met if cargo was unloaded in New York and the accident occurred in Maine, so long as the injury was suffered in an area adjoining *some* navigable water. Perhaps recognizing this, the court hastened to add that the area where Stockman was injured was used for the loading and unloading of *some* vessels (though not the one in question) and was "generally part of the same Boston waterfront area" as the involved vessel (though two miles

away by truck). The court then added: "We are not faced with the stripping of a container at an inland freight depot having only some incidental connection with navigable waters." But therein lies the very ambiguity which the courts have been saying Congress attempted to avoid. What is an "incidental connection" as opposed to, say, a substantial connection? Suppose Stockman had been just outside "the Boston waterfront area"—whatever that may be defined to mean? What about the building in *Blundo* which was used exclusively for storage and stripping? Or the public streets, where the employee was injured in *Sea-Land Service*? How can the Administrative Law Judges possibly administer the Act in a consistent and even-handed way under any such construction of the "situs" test?

The court's treatment of the "status" test was equally confusing. The court was faced, as it acknowledged (A. 26a), with clear and unequivocal statements in the Committee reports that the Amendments were not intended to extend coverage to new groups or classes of employees and instead were limited to those who performed at least some of the traditional longshoring duties covered by the prior Act. But there was no evidence that Stockman's duties required him at any time to work aboard ship or to engage in the typical longshoring activity of taking cargo on or off a vessel. So what did the Court of Appeals do with this "troublesome question" (*id.*)? It read the Committee reports as meaning not that the *injured employee* need to have been engaged in activities covered by the earlier Act but only that he be part of "a *class* of employees whose members would *for the most part* have been covered *some of the time* under the earlier Act * * *" (A. 27a; emphasis added). We submit that there is not a scintilla of evidence in the statutory language or legislative history to support this conclusion. Even worse, such a formulation would lead

to total confusion in the administration of the Act, with employees, stevedoring companies and insurance carriers battling to prove or disprove what "class" the injured worker was a part of, whether the class's members "for the most part" performed longshoring duties, and whether they did so "some of the time".

The three judges below were in conflict not only with Judges Winter, Haynsworth, Russell and Lumbard on the "point-of-rest" principle but with other judges on other aspects of the coverage problem as well, including the effect of the presumption in Section 920 of the Act,[8] the need to pay special deference to the views of the Benefits Review Board, and the issue of whether it is the job being performed at the time of injury that determines coverage.

This type of confusion continues in a case which was decided by the Fifth Circuit after the *Caputo* and *Blundo* Petitions were filed, and which is printed beginning at page 44a of the Appendix hereto.[9] In the *Perdue* case, the Fifth Circuit first flatly rejected the view of the court below that the nature of the work being performed at the time of injury is not determinative of coverage (A. 52a, 55a, 59a).[10] It rejected the "point-of-rest" principle (A. 53a, 62a), but it also rejected Judge Friendly's formulation in *Blundo* that cargo handlers had to have spent a significant part of their time in taking cargo on or off vessels (*cf.* A. 54a-55a n. 21 with pages 39a-40a of the Appendix to *Blundo*). It disagreed with the view

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[8] *Cf.* A. 10a with page 17-18 of the *Blundo* Petition.

[9] *Cf.* A. 10a-12a with page 17 of the *Blundo* Petition.

[10] The court below felt that the claimant's status need not depend wholly on the job being performed at the time of injury (A. 21a). This is directly contrary to the views of the *Gilmore* court (528 F.2d at 961), of all the judges, including the dissenters, in *Benefits Review Board* (529 F.2d at 1088, 1093; p. 117a of the Appendix to the *Blundo* Petition); with the entire court in *Sea-Land Service* (p. 110a of the Appendix to the *Blundo* Petition); and, as shown *infra*, with the entire court in *Perdue*.

of the *Gilmore* panel and the court below that a particular union affiliation had any significance (*cf.* A. 52a n. 16, 55a, 63a n. 25, with 528 F.2d at 962 and A. 5a, 17a). And it came up with an entirely new concept in regard to "situs"—namely, that the "situs" must actually be used, *at the time of the accident*, for one of the functions specified in the Act, such as loading or unloading (A. 55a). The *Perdue* court said: "[w]e reject the argument that the new Act covers every point in a large marine facility where a ship repairman might go at his employer's direction" (A. 57a)—a statement which presumably would have excluded Stockman from coverage in the instant case.[11]

Perdue and the instant case simply illustrate once again that only prompt intervention by this Court will prevent further confusion and uncertainty in this already thoroughly confused and highly uncertain area of the law.

CONCLUSION

We respectfully urge the Court to grant certiorari and to reverse the judgment of the court below.

Respectfully submitted,

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[11] While affirming the awards to several injured employees, the *Perdue* court reversed as to two others. The court's reasoning as to the two non-covered employees is clearly in conflict with the approach taken by the court below and by the *Sea-Land Service* panel and the majority in *Benefits Review Board*.

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1360

JOHN A. STOCKMAN,
Claimant, Respondent,

v.

JOHN T. CLARK & SON OF BOSTON, INC.,

and

AMERICAN MUTUAL LIABILITY INC. CO.,
Employer/Carrier, Petitioners,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Party in Interest.

ON PETITION FROM THE
BENEFITS REVIEW BOARD

Before COFFIN, *Chief Judge,*
McENTEE and CAMPBELL, *Circuit Judges.*

George O. Driscoll for appellants.

Joseph P. Flannery, with whom *Joseph G. Abromovitz* and *Kaplan, Latti and Flannery* were on brief, for John A. Stockman, appellee.

Linda L. Carroll, Attorney, United States Department of Labor, with whom *William J. Kilberg*, Solicitor of Labor, and *Laurie M. Streeter*, Associate Solicitor, were on brief, for Director, Office of Workers' Compensation Programs, appellee.

July 27, 1976

CAMPBELL, *Circuit Judge*. This petition for review, brought by an employer and its compensation carrier, raises a difficult question of interpreting the 1972 amendments to the Longshoremen's and Harborworkers' Compensation Act (the Act). 33 U.S.C. § 901 et seq.

Working on the Boston waterfront for his employer, John T. Clark & Son of Boston, Inc. (Clark), John A. Stockman sustained an inguinal hernia on October 1, 1973, while removing the contents of a container [1] which had previously been off-loaded from a vessel. Clark and its insurer, acknowledging liability under Massachusetts workmen's compensation law, furnished Stockman with medical care and paid him compensation at the maximum weekly state rate of $80 during the seven weeks that he was disabled. Stockman claimed, however, that he was entitled to be compensated at the much higher rate provided in the Longshoremen's and Harborworkers' Compensation Act. Total benefits payable under the Act for the period of disability in question exceeded those payable under Massachusetts law by more than $700. When Clark and its carrier refused to acknowledge that

[1] Containers are rectangular metal structures used to transport cargo. After being taken off the vessel by crane, they are provided with a chassis and wheels and converted into large box trailers capable of being trailed on the highways by tractors.

Stockman was covered by the Act, the matter was referred to an Administrative Law Judge, § 919, who ruled after hearing that Stockman was covered. Clark and the carrier appealed from this ruling to the Benefits Review Board (the Board), § 921(b) (1976 Supp.), which affirmed the decision of the Administrative Law Judge. Thereafter they brought this petition, § 921(c) (1976 Supp.).

I

The difficulty in determining Stockman's coverage arises from the essential ambiguity of the 1972 amendments insofar as they describe, or fail to describe, the employees for whom coverage is afforded. As was developed at the hearing before the Administrative Law Judge, Stockman was a regular employee of Clark who had for three years prior to his injury worked at Berth 5 of the Boston Army Base, an area adjacent to Boston Harbor. Clark is both a stevedore, i.e. a firm engaging directly in the unloading of vessels, and a terminal operator.[2] Clark's Boston Army Base facility was used

[2] Mr. Kelley, Clark's Treasurer, gave his view of the difference between a stevedoring and a terminal operation as follows:

> "The distinction is the point of rest. Cargo that is—whether it be containers or freight bulk cargo—when the longshore gangs are working the cargo and discharging it and they bring that cargo to a point of rest, either in a shed or outside a shed, and they terminate, they finish their job, that's the end of the stevedoring function, and from that point on the terminal operation function takes over, it's somewhat similar to a warehousing operation."

Under Kelley's theory, once the stevedoring function ended, the work became freight handling.

Stockman, on the other hand, insisted,

> "Cargo is merchandise that's carried in a vessel and I maintain that cargo does not become freight until after it's grounded on the dock [viz. trucking dock] and the truck driver comes in and touches it. ILA [the International Longshoremen's Association, of which Stockman was a member] helps handle it all the way until it's actually taken out of that container. The container in my opinion is more or less part of the ship."

both to unload vessels that berthed there, and to store and warehouse cargo which had either been unloaded there or been brought in containers from vessels berthed elsewhere.

At the time Stockman sustained a hernia, he was at Berth 5 of the Boston Army Base "stripping" (removing cargo from) a container. The container had been discharged from a vessel that had berthed during the previous three days at Berth 17, Castle Island, a facility located approximately two miles by land or 700-800 feet across water from the Boston Army Base. Under the terms of its contract with Sea-Land Corporation, the owner of the container, Clark was "to unload vessels as they come into port [and] discharge the containers." However, Sea-Land's container vessels did not dock at the Army Base since they require a special crane and berth not available there. Sea-Land's vessels berthed instead at Castle Island, where the containers were put ashore; chassis with wheels were provided; and those containers having full loads for a particular consignee were hitched to a truck-tractor and hauled directly to their ultimate destinations, to be unloaded by the consignee. Some containers would not, however, contain a full load for one consignee and it was up to Clark to strip them, separate their contents by orders, and hold the goods for pickup by consignees. In such cases, as there were no facilities at Castle Island either for stripping or for "stuffing" (placing cargo in) containers, the containers would first be hauled by an independent trucking firm, engaged by Sea-Land, to Clark's Boston Army Base facility. There Clark would remove the contents from the containers, place them on pallets, and hold them for pick-up by truckers for the various consignees. The container Stockman was stripping had been hauled overland from Castle Island by a truck furnished by the

Boston-Taunton Transportation Company under contract with Sea-Land; and Stockman was removing the contents and placing them on pallets at Berth 5 of the Boston Army Base when he sustained his injury.

At the hearing various descriptions were offered of Stockman's job-title. Mr. Kelley, Clark's treasurer, called Stockman a "freight handler" as "that's the insurance code classification that he would fall under". Stockman himself testified that he was classified as a crane operator and for casual work on the dock. He said he drove chisels, stuffed and stripped containers, and shifted cargo. The parties stipulated that Stockman was "employed as a longshoreman with collateral ratings as a cooper and extra dock laborer". Stockman was a member of the International Longshoremen's Association, AFL-CIO, and Clark a member of the Boston Shipping Association, Inc. Under an agreement between the ILA and the Shipping Association, containers within 50 miles of a port (other than ones handled by the "beneficial owners" of the cargo) had to be stuffed and stripped by ILA longshore labor working on a "waterfront facility, pier or dock."

The relevant provisions of the Act against which Stockman's claim of coverage must be measured are §§ 902 (3), 902(4) and 903(a), all as amended in 1972. Section 903(a), entitled "coverage", is sometimes referred to as the "situs" requirement, and provides as follows:

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . ."

Section 902(3), sometimes referred to as the principal "status" requirement, defines and limits the term "employee" to,

> "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker [exclusive of a master or member of a crew of any vessel, or any person engaged to load, unload or repair any small vessel under eighteen tons net]."

There is also the following definition of "employer" in § 902(4),

> "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

The Administrative Law Judge, whose reasoning the Benefits Review Board affirmed, ruled that Stockman's injury occurred at a location within the situs requirements of § 903(a). He found that Stockman was employed to unload containers at Berth 5 of the Boston Army Base; that Berth 5 adjoins navigable waters "and is used for the general cargo operations of loading and unloading vessels, although the stripping of containers received from Berth 17, Castle Island is considered a terminal operation"; and that Stockman's injury met the Act's situs requirements since wharf and terminal areas are specifically mentioned in § 903(a). The Administrative Law Judge attached no weight to the fact that the container had not been discharged from a vessel at Berth 5 of the Boston Army Base but had been driven two miles overland from Castle Island, Berth 5 being,

in any event, a "terminal adjoining navigable waters". And even were this not so, Clark's Army Base facilities were an "other adjoining area customarily used by an employer in . . . unloading . . . a vessel," since any and all Sea-Land containers that were to be stripped were customarily trucked there from Castle Island as an integral step in the process of unloading a vessel.

The Administrative Law Judge went on to rule that Clark, being both a stevedore and terminal operator, was an "employer" within § 902(4) since it employed longshoremen to perform some of this work.

Finally, the Judge held that Stockman met the status definition of "employee" under § 902(3), being engaged in "maritime employment". The Judge thought that little attention should be paid labels such as longshoreman or "freight handler". Stating that it was not the label given but "the nature of the work being performed" that was determinative, the Judge held that "[u]ntil the contents were removed from the containers the unloading procedure had not been completely executed. The unloading of this container was an integral and sequential part of the process of unloading cargo from a vessel. *Cf. Powell* v. *Cargill, Inc.*, [74-LHCA-172 (October 8, 1974)]; *Richardson* v. *Great Lakes Storage & Contracting Co., et al.*, 74-LHCA-223 (October 18, 1974)". The Judge continued,

> "The fact that the containers had to be trucked two miles across the channel for unloading is not significant. The containers, at this point, were not being picked up from storage for further transshipment, but were merely being transported for unloading. If the containers had been stripped by longshoremen at the Castle Island facility where they arrived, this work activity would, in my view, have been clearly covered by the Act. Claimant should not be denied the protection and coverage

> of the Act merely because circumstances required his Employer to have longshoremen perform the stripping function at another waterfront facility two miles away. *Cf. Crampton* v. *Cargill, Incorporated*, 74-LHCA-215 . . . . Such a finding would not be within the "humanitarian goals" of the Act.
>
> . . . I hold that the Claimant was injured in a shoreside area while he and his Employer were engaged in maritime employment within the coverage of the Act."

In affirming, the Benefits Review Board held it to be "now well settled" that a claimant like Stockman was within the jurisdictional reach of the Act. It said that stripping and stuffing containers were "maritime employment", and that the temporary resting of containers for three days prior to stripping was immaterial to the maritime nature of the employment.

III

While the Board's determination is consistent with its other recent rulings finding coverage for most handlers of ship's cargo at piers and waterfront terminals, whatever their precise function, judicial decisions to date construing the 1972 amendments reflect a sharp difference of opinion over the reach of the Act. A divided panel of the fourth circuit has ruled that terminal employees, as distinct from those immediately engaged in taking cargo from (or putting it on) a vessel lying at its berth, are not covered even when injured in an area more immediately adjacent to the ship's berth than was the Boston Army Base here. Terminal employees are not, in its view, engaged in maritime employment within the meaning of § 902(3). *I.T.O. Corp.* v. *Benefits Review Board*, 529 F.2d 1080 (1975), reargued en banc May 4, 1976. The court felt that while the 1972 amendments enlarged the "situs" so as to provide compensation for injuries occurring at designated shoreside facilities as well as on shipboard, they narrowed the "status" requirement so as to limit coverage to only maritime workers engaged most directly in traditional employment, e.g., in cases of longshoremen, those immediately engaged, at the time of injury, in the direct loading or unloading of a vessel itself. To give effect to its interpretation of the amendments, the fourth circuit read into the Act the notion of "point of rest", a point shoreward of which the handling of cargo would cease to be covered by the Act.

A divided second circuit panel has rejected altogether the fourth circuit's point of rest approach. *Pittston Stevedoring Corp.* v. *Dellaventura*, Nos. 76-4042,-4009,-4043,-4249 (July 1, 1976) (Friendly, J.) In *Pittston*, one of the employees was a "checker" who, like Stockman, was stripping a container of goods destined to different consignees at a waterfront area remote from where the ship had been unloaded. The court held that stripping was the "functional equivalent" of sorting cargo discharged from a ship, and was covered by the Act.

From the present judicial melange[3] can be gathered the truth of Judge Friendly's remark:

> "Given the importance of the question, the number of courts of appeals endeavoring to find an answer, and the divergence of opinion already manifested, it seems unlikely that the opinion of any court of appeals will be the last word to be said." Slip op. at 4683.

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[3] The ninth circuit has also recently interpreted the coverage provisions of the Act, though on facts so different (longshoremen were not involved) as to make the decision of little relevance here. *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3645 (U.S. May 6, 1976) (No. 75-1620). The court emphasized that for an employee to be eligible, his own work and employment must have a "realistically significant relationship" to traditional maritime activity.

IV

Before expressing our views on the merits, we turn to several preliminaries. First, we consider whether in deciding the scope and coverage of the Act, we should give weight to the presumption stated in § 920 that "the claim comes within the provisions of this chapter". We think not. This provision relieves an injured employee from a perhaps bothersome burden in cases where coverage is uncontested, and it may well denote a policy favoring coverage in close cases; but we do not think it bears on the decision before us calling for a general construction of "whether Congress placed the line at the 'point of rest' or much further landward". *Pittston*, *supra*, at 4703-04. This basic interpretative decision must precede any application of the presumption.

Second, we do not see the decision before us as one where we owe a special deference to the decision of the Board (and of the Administrative Law Judge, whose views were seemingly carried forward in the Board's shorter opinion). Judge Craven, dissenting in *I.T.O.*, *supra*, 529 F.2d at 1091, quoted the Supreme Court in *NLRB* v. *Boeing*, 412 U.S. 67, 75 (1973), to the effect that "[a] consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference by the courts." Under § 939 the Secretary is directed to administer the Act and to make necessary rules and regulations, and under § 921 (1976 Supp.) the Benefits Review Board, with members appointed by the Secretary, is charged with determining appeals subject to review by courts of appeal. Judge Craven concluded that the Board, in "an unbroken line of decisions", has consistently and reasonably interpreted the coverage provisions found in the 1972 amendments, and that this interpretation should be accorded " 'great weight' " by a court. 529 F.2d at 1092.

But while the Board's views are obviously to be regarded with interest and respect, we do not think we are justified in a case of this character in subordinating our own judgment. Professor Davis' discussion is particularly helpful in considering how much deference a court ought to accord to agency determinations. 4 Davis, Administrative Law Treatise § 30.09 et seq. He suggests three criteria: (1) the relative expertise of agency and court; (2) whether there is express statutory delegation of a question to the agency; and (3) whether the problem involves general propositions or the application of such propositions to specific facts.

The first criterion, the expertise of the court relative to that of the agency, depends in turn upon the nature of the question to be decided. Here the Secretary of Labor and the Board may know more about the technical aspects of work on the waterfront, the needs of workers, and the labor management issues intertwined with the Act, but they have no greater expertise than a court in construing statutes, judicial decisions and legislative history, and the latter is the paramount task before us.

The second criterion is the extent to which Congress may have expressly entrusted the question to the agency rather than to a court. Here Congress entrusted to the Secretary the daily administration of the Act, but created an independent Benefits Review Board to determine appeals "raising a substantial question of law or fact" from initial orders, § 921(b)(3) (1976 Supp.), with ultimate review in the courts of appeal. From this structure, we can doubtless infer an intention to grant to the Board, subject to court review, a substantial oversight of questions of law and policy affecting the distribution of benefits in a particular case. Still, we agree with Judge Friendly that the Board is less a policy-making and more an "umpiring" body than is true of agencies such as the National Labor Relations Board, *see Pittston*, *supra*, at

4706, while the Secretary's own discretion, being subordinate in the legal area to that of the Board, is even more limited. In sum, while on occasion we may well expect to defer to the Secretary or the Board in particular applications, we see neither the Board nor the Secretary as having been commissioned to settle the sort of question, involving the general construction of an act of Congress, encountered here.

As Davis points out in presenting his third and final criterion, a distinction exists "between enunciation of general propositions or methods of approach and the mere application of such propositions or methods to unique facts." § 30.11, at 253. A question such as whether the Act is to be interpreted to cover all workers in the loading or unloading process, defined broadly, or only those immediately associated with taking the cargo on or off a certain vessel, is the kind of "general proposition" on which courts must provide their own judgment. *Id.* at 254.

This is not to overlook our duty to accept the Board's factual findings when supported by substantial evidence. *Pittston*, *supra*, at 4704. Although not expressly stated in the Act, *compare* § 921(b)(3) (requiring the Board to accept the supported findings of the Administrative Law Judge), we readily assume the existence of such a duty. Still the material facts are not in dispute, and as the focus is upon the meaning of the statute, the judgment must be our own, not the Board's.

V

Proceeding, then, to our own assessment of Stockman's status under the current Act, it is useful first to consider the prior law and the changes brought about by the 1972 amendments. Compensation was previously payable only if disability or death resulted from injury occurring upon "navigable waters" including "any dry

dock". Recovery was expressly forbidden if recovery could be validly provided under state workmen's compensation laws. The Supreme Court accordingly interpreted the earlier Act to reimburse only injuries seaward of the pier, e.g. on shipboard or other like structure within the narrow confines of the admiralty tort jurisdiction. *Nacirema Co.* v. *Johnson*, 396 U.S. 212 (1969) (no coverage under the Act for injuries to longshoremen occurring on a pier affixed to land); *cf. Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (1971). Thus before the amendments, the Act was regarded as a rather limited supplement to state workmen's compensation laws,[4] designed not to supersede or improve upon those laws but to fill a gap which the states were without jurisdiction to fill. *Cf. Washington* v. *Dawson & Co.*, 264 U.S. 219 (1924); *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (1922); *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917).

An anomaly was then created by this narrow reliance on location or "situs" to delineate the limits of coverage—the same longshoreman who could recover if injured while working on board a ship could not recover if injured a few feet away from the ship on a pier. In *Nacirema* the Court recognized and discussed this seeming

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[4] During the pre-1972 period, longshoremen and harbor-workers injured on shipboard (or on land by a ship's appurtenance) could sue the vessel for unseaworthiness as well as for negligence, achieving, in some instances, recoveries far beyond anything available under the Act. *Guttierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963); *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946). The 1972 amendments eliminated the unseaworthiness remedy for longshoremen and harborworkers while greatly increasing the benefits payable under the Act and by enlarging its scope to include injuries on piers and terminals adjoining navigable waters. The amendments also removed the express exclusion for injuries which would be covered under state workmen's compensation laws.

unfairness but felt there was little to be done.[5] It discussed the matter in terms of "situs" and "status", terms used by the Administrative Law Judge in the present case (Stockman's injury was said to have occurred within the "situs" provisions of the Act and his employment to meet the "status" provisions). The Court said that it was being urged to extend coverage on the basis of the "status" of longshoremen employed in performing a maritime contract, 396 U.S. at 215, but declined to do so, reading the Act as determining coverage exclusively by the "situs" of the injury. The Court went on to state,

> "Congress might have extended coverage to all longshoremen by exercising its power over maritime contracts. 7 [7. The admiralty jurisdiction in tort was traditionally 'bounded by locality,' encompassing all torts that took place on navigable waters. By contrast, admiralty contract jurisdiction 'extends over all contracts, (wheresoever they may be made or executed . . .) which relate to the navigation, business or commerce of the sea.' Since a workmen's compensation act combines elements of both tort and contract, Congress need not have tested coverage by locality alone. As the text indicates, however, the history of the Act shows that Congress did indeed do just that.] But the language of the Act is to the contrary and the background of the statute leaves little doubt that Congress' concern in pro-

[5] The Court said in *Nacirema*,

> "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension [of Admiralty Jurisdiction] Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act."

396 U.S. at 223. The Court concluded that while Congress could draw whatever line it chose, "the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court." 396 U.S. at 224.

> viding compensation was a narrower one." [Citations omitted.]

396 U.S. at 215-16.

Against this background, Congress enacted the 1972 amendments. With respect to "situs", it clearly shut the door on any continued interpretation of the Act's boundaries as being coextensive with the boundaries of admiralty tort jurisdiction. While disability or death must still result from an injury occurring upon the "navigable waters of the United States", these are now defined to include shoreside structures such as a pier, terminal, or "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel". Such facilities, not ordinarily considered to be "navigable waters", have always been outside the exclusive federal admiralty tort jurisdiction. They are areas where the authority of the United States to enact compensation laws for maritime workers overlaps state authority to enact workmen's compensation laws.[6]

Doubtless in part because of this overlap, Congress did not limit its changes in 1972 to a widening of the "situs" requirement. For the first time, it undertook to define the class of persons covered by inserting an inclusive definition of "employee", § 902(3). Thus while "status", as distinct from "situs", was formerly of minor importance, *cf. Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334 (1953), it has become a matter of considerable significance. Only an "employee" is covered, defined as "any person engaged in maritime employment, including any longshoreman or other person engaged in

[6] As indicated in the text, the Supreme Court went to some length in *Nacirema* to indicate that Congress had power to extend federal workmen's compensation laws for those in maritime employment shoreward, into areas outside the exclusive admiralty tort jurisdiction.

longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . ." § 902(3).

VI

In the present case, we hold that the situs requirement of § 903(a) was plainly met, in spite of the distance separating Berth 5 of the Boston Army Base from the Sea-Land berth at Castle Island. Appellants' only substantial argument is their challenge to Stockman's status as a member of the covered class under § 902(3).[7]

On the question of situs, the simple fact is that the amended Act defines navigable waters to include "any adjoining pier, wharf, . . . terminal, . . . or other adjoining area customarily used by an employer in loading [or] unloading . . . a vessel". § 903(a). "Adjoining" can only refer to navigable waters; and Stockman was, as even Clark concedes, working at a terminal which adjoined navigable waters. To be sure, the final reference to "other adjoining area customarily used by an employer in loading [or] unloading . . . a vessel", as well as other parts of the statute, suggests that Congress had in mind a terminal associated with the shipboard movement of marine cargoes. But we do not think Congress meant necessarily to limit "adjoining" to only those areas directly adjoining the berth of the specific vessel being unloaded. The terminal here in question is at a location which is customarily used in loading and unloading ves-

[7] Stockman contends that since appellants did not initially shape their argument before us in terms of status, but rather urged that the Army Base facility not being contiguous with Sea-Land's Castle Island berth, was outside the situs provision, we should decline to consider the issue of status. But status was considered both by the Administrative Law Judge and by the Board, and we think no purpose is served in bifurcating the issues at this stage, the ultimate question being one of construing the statute as a whole. In a reply brief, appellants have belatedly briefed the status issue.

sels. Some vessels do, in fact, lie there for loading and unloading. Moreover, the area is several hundred yards directly across open water from the berth of Sea-Land's container vessels and is generally part of the same Boston waterfront area. We are not faced with the stripping of a container at an inland freight depot having only some incidental connection with navigable waters. We therefore conclude, from all these factors, that the situs requirement of § 903(a) has been met.

We thus return to what we regard as the only issue on which appellants could prevail, whether Stockman was engaged in "maritime employment" within § 902(3). We agree generally with Judge Winter, writing for the majority in *I.T.O.*, *supra*, 529 F.2d at 1084-85, that the terms "maritime employment", "longshoreman" and "longshoring operations" in § 902(3) do not have any such settled meaning that we should decide the case without resort to the legislative history.

We start with the obvious fact that the Act and the relevant House and Senate Reports speak repeatedly of longshoremen, indicating, if it could be doubted, that they are a prime class of employee intended to be benefited. Stockman, the parties stipulated, is a "longshoreman"; he belongs to the ILA; and he works at a waterfront terminal for a stevedore and terminal operator whose chief activity appears to be the handling of shipborne cargo. Clark was under contract to "unload [Sea-Land] vessels as they come into port [and] discharge the containers", and it was in connection with this latter operation that Stockman was injured.

Still, as the second circuit points out, "it is not enough that a claimant calls himself a longshoreman or that a longshoreman's union in a particular port has forced employers to hire its members for such unlongshoremen-like positions as clerks or guards." *Pittston*, *supra*, at

4712. To be sure, stuffing and stripping containers is much closer to conventional longshore activity than clerking or guarding, though the analogy is not total because the containers, once landed, are transformed into trailers. The contract between the ILA and the Boston Shipping Association, in evidence here, reflects a negotiated undertaking to use only longshore labor to strip and stuff containers, and to do so exclusively at waterfront facilities. Doubtless the union insisted upon such a provision because otherwise containers could be driven to most any location and discharged there by non-waterfront labor. And its insistence upon the use of longshore labor was not totally arbitrary. Containerization greatly simplifies and speeds up the actual loading and unloading of the ship itself, cutting down the workforce needed for those operations. Much of the loading and unloading that used to take place on or alongside the ship is presumably now reflected in the stuffing and stripping of containers. From the longshoremen's point of view this is "traditional" work, and, as further discussed below, there is much to support their position.

But while such considerations indicate that stuffing and stripping—unlike clerking and guarding—cannot be dismissed as beyond the reasonable purview of longshore work, they do not tell us what coverage Congress had in mind. Before proceeding further, we set forth the relevant passages from the House Report:

"Extension of Coverage to Shoreside Areas

> "The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur 'upon the navigable waters of the United States.' Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury

depending on which side of the water's edge and in which State the accident occurs.

> "To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. . . .
>
> . . .
>
> "It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.
>
> "The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

"The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters."

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess.

Two other courts of appeals have already interpreted the Act in light of these passages, coming to quite different conclusions. Judge Winter, writing in *I.T.O.* for the fourth circuit, read the committee reports as limiting coverage to those engaged in the immediate loading and

unloading of ships, particularly in view of the stated intent of the committees to achieve uniform compensation of employees who would otherwise be covered for part of their activity. The fourth circuit then went on to limit coverage to injuries occurring between the first dockside holding area and the ship.[8]

The second circuit, to the contrary, emphasizing the committee's concern for a "uniform compensation system", read the legislative reports as manifesting an intention to cover, rather more broadly, those taking part at the designated sites in the complex process of loading or unloading a vessel, though it rejected (as do we) one commentary's shotgun approach that "all employment related injuries which occur within the Act's territorial limits" be covered. G. Gilmore & C. Black, Law of Admiralty § 6-51, at 430 (3d ed. 1975), *quoted in Pitston, supra*, at 4719-20 & n. 27. In refusing to follow the fourth circuit, the second circuit made much of the fact that "employee" under the Act includes "any longshoreman" as well as "other person engaged in longshoring operations". Thus "[a] 'longshoreman' may . . . be covered at some times even when he is not engaged in traditional longshoring activity." *Id.* at 4712. We agree with Judge Friendly that, whatever the workers covered, a claimant's status need not depend wholly on the job being performed at the very moment of injury.

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[8] Judge Winter acknowledged that the point of rest rule so formulated might result in coverage for a longshoreman working exclusively on shore between the point of rest and the ship. While such a shorebound worker would never have been covered under the old Act, Judge Winter felt that coverage could be inferred from the committee language as a whole and the liberality of construction to be afforded remedial legislation of this type. *I.T.O., supra*, at 1088. Inexplicably, Judge Winter did not discuss the opposite side of the coin: the failure of a point of rest rule to cover a longshoreman who works part of the time on vessels but whose injury occurs while he is working at a covered situs shoreward of the point of rest.

It seems clear that, however construed, the House Committee Report, and the similar Senate Committee Report, Sen. Rep. No. 92-1125, 92d Cong. 2d Sess., go only part way towards clarifying the application of the 1972 amendments in the present situation. None of the mentioned examples refer to someone like Stockman. Stockman is plainly not an employee "whose responsibility is only to pick up stored cargo for further transshipment"; nor do we think that hauling the trailer from the Sea-Land berth to the Boston Army Base for stripping can be viewed as picking up stored cargo for transshipment. Indeed, Congress has seemingly gone out of its way to avoid taking any express stance on the status of those engaged in stuffing and stripping containers as part of the loading and unloading process just as it is silent on the status of other terminal employees engaged in moving, storing and culling cargo on the pier. Still, while scarcely explicit, the legislative reports do convey several relevant messages:

1. The amendments are to be construed to achieve a "uniform compensation system" which does not depend on the "fortuitous circumstance of whether the injury [to the longshoreman] occurred on land or over water".

2. The amendments are to afford coverage to employees, or possibly classes of employees, who would otherwise have been covered for part of their activity by the the earlier Act.

3. One of the reasons for affording coverage on land is that "with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore".

Attempting to reconcile these notions, we are not satisfied with the "point of rest" theory advanced by the fourth circuit. To be sure, the committee reports state that coverage is for employees who formerly would have

been covered for part of their activity, in other words those whose duties require their part-time presence on shipboard (as there would be no coverage under the old Act for purely landbased workers). But we see nothing to suggest that Congress meant, for example, to exclude from benefits a steadily employed longshoreman whose duties periodically took him aboard ship but who, at the time of injury, was engaged in moving terminal cargo shoreward of the point of rest. The fourth circuit's view would create, in effect, a further and more narrow situs requirement than that in the Act. *See* Judge Craven's dissent in *I.T.O. supra*, at 1096-97. Whether the status of at least a steady employee is that of a "maritime" worker, including "longshoreman", seems to us to require looking at the nature of his regularly assigned duties as a whole.

We would further comment that the fourth circuit view does not seem compatible with the "uniformity" of coverage Congress was seeking. The evil of the old Act was that it bifurcated coverage for essentially the same employment. The point of rest approach would seem to result in the same sort of bifurcation, since the same employee engaged in an activity beyond the point of rest would cease to be covered. This is not to say that Congress might not have focused the generous benefits of the Act on direct loading and unloading activities to the exclusion of others. These are at the heart of the longshoreman's traditional work and may be more dangerous.[9] But Congress expressly included "terminal" in

[9] There is no distinction made in the committee reports based on the dangerousness of the work performed. The reports do reflect a belief that state workmen's compensation payments are typically inadequate—not just, it seems, for longshoremen but for workers generally. In the sense that the 1972 Amendments are intended to provide a more adequate level of coverage, they are "remedial" and entitled, like the Act orginally, to be "liberally construed in conformance with its purpose . . . ." *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953).

the situs provisions of the Act, and we think that if a bifurcation of this sort were intended, the Act, or at least the legislative history, would have pointed to it explicitly. We therefore reject the fourth circuit's point of rest analysis.

We are more persuaded by the reasoning of the second circuit in *Pittston*, which held as follows:

> "We therefore hold that the [1972] Amendments at least cover all persons meeting the situs requirements (1) who are engaged in stripping or stuffing containers or (2) are engaged in the handling of cargo up to the point where the consignee had actually begun its movement from the pier (or in the case of loading, from the time when the consignee had stopped his vehicle at the pier), provided in the latter instances that the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel."

Slip op. at 4719. In order to arrive at (1), the *Pittston* court laid heavy stress on the specific mention in the committee reports of "the advent of modern cargo-handling techniques, such as containerization" and on the committees' recognition that this caused more of the longshoreman's work to be performed on land. It also noted the committees' sanction for coverage of "checkers" (who check the contents of containers against bills of lading) without limitation as to where the checking would be done. The court said,

> "Stripping a container of goods destined to different consignees is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship . . . . Congress intended to cover men engaged in these activities if they met the situs test contained in the Act—irrespective of the employee's position vis-a-vis a 'point of rest.' . . . One answer to petitioners' argument

> that stuffing or stripping a container on a pier is no different from doing the same job a mile away is that Congress may have doubted its power, under the admiralty clause of Article III, to go further than it did. . . . We fail to perceive any significant difference because, for the convenience of someone, it [the container] had been moved to another pier. The cargo had not yet been delivered to the consignee; the unloading process still had not been completed." [Footnote deleted.]

Slip op. at 4714.

Except in one respect, discussed later, we find Judge Friendly's analysis with respect to handling the contents of containers not only persuasive but compelling. The historical work of longshoremen was said to be, "in connection with unloading cargo, the breaking up of drafts and pallets, sorting the cargo according to its consignees and delivering it to the trucks or other carriers." *Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n*, 426 F.2d 884, 886 (2d Cir. 1970). This conforms to the usual obligation of the ship "[t]o unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee, and afford the consignee a reasonable opportunity to come and get it." *American Presidential Lines, Ltd.* v. *Federal Maritime Board*, 317 F.2d 887, 888 (D.C. Cir. 1962).

If a container is discharged from a vessel containing goods for a number of consignees neither the shipowner nor the longshoremen will have completed their work until the container is stripped and the cargo sorted so as to be accessible to the consignees. We agree with Judge Friendly that it can make little difference with respect to the longshoreman's activity whether the stripping and sorting is done where the container first comes to rest on the pier or shoreward of that point. If there

is a relevant difference, Congress has not mentioned it. The committees do emphasize that coverage is not intended for employees "who are not engaged in loading [or] unloading . . . a vessel"; but it seems both reasonable and consistent with existing practice, to view the unloading process as not yet complete so long as unsorted goods destined for various consignees remain inside the original container within which they were shipped, even though the containers have already been removed from the hold of the vessel. On this premise, one stripping a container retains the status of a "longshoreman" and is "engaged in longshoring operations".

The most troublesome question, as we see it, is reconciling this view with the statement in the committee reports that the compensation system of the Act is to apply to employees who would otherwise be covered for part of their activity. That statement, as well as other parts of the committee reports, indicates that Congress, in moving shoreward, did not see itself as including under the Act whole new groups and classes of employees. Coverage was still to be geared only to persons who loaded and unloaded vessels (or else repaired or built them) and who fit such traditional maritime designations as longshoreman, harborworker, and the like. Thus, as indicated previously, we quite agree with the second circuit that clerks and other like terminal workers are excluded.

The problem is whether those performing longshoring operations, like Stockman, are also to be excluded unless they can demonstrate that part of their normal duties requires them to go aboard a ship—or, as Judge Friendly said (with respect to "cargo handlers", but not strippers or stuffers), unless "the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel". *Pittston*, *supra*, at 4719.

We conclude, however, in accord with the second circuit, that there is no need for such a showing in the

case of persons employed, like Stockman, in the stripping of containers containing unsorted cargo, destined for several consignees, at a location within the situs requirement. Such an individual, like a longshoreman working on the pier alongside a ship during unloading operations, is a longshoreman within § 902(3). Whatever the language of the committee reports, the statute itself calls for no additional showing once that status has been firmly established. It is clear, as indeed Judge Winter recognizes, *I.T.O. supra*, at 1088, that even longshoring work in its traditional form is at times organized so that some workers remain at all times on the pier as part of a continuous loading or unloading process. *See Garrett* v. *Gutzeit O/Y*, 491 F.2d 228 (4th Cir. 1974). Plainly such men are no less longshoremen than their brethren on the vessel. While Congress did not mean in the 1972 amendments to cover new classes of employees not heretofore covered in part, we do not believe it meant to exclude from coverage those particular members of a covered group, e.g. longshoremen, whose individual duties do not happen to take them on shipboard. We read the language of the committee reports as requiring bona fide membership in a class of employees whose members would for the most part have been covered some of the time under the earlier Act—not necessarily a demonstration by each claimant that he individually would have been covered.

This is not to say that workers who are not plainly longshoremen, or otherwise plainly included in some recognized category of maritime employment, may not have to demonstrate their entitlement to coverage by showing that their duties encompass shipboard activity. Something like this thinking doubtless accounts for clause (2) of the second circuit's formulation, relating to "cargo handlers" as distinct from those stuffing or stripping containers. We expressly do not decide this matter now.

since it is not before us. We hold only that an employee like Stockman, being a longshoreman and engaging in longshoring operations, comes within the status requirement of the Act.

Affirmed. Costs for appellees.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1360

JOHN A. STOCKMAN,
Claimant, Respondent,

v.

JOHN T. CLARK & SON OF BOSTON, INC.,

and

AMERICAN MUTUAL LIABILITY, INC., CO.,
Employer/Carrier, Petitioners,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Party in Interest.

DECREE

Entered July 27, 1976

This cause came on to be heard upon a petition for review of an order of the Benefits Review Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the Benefits Review Board is hereby affirmed. Costs to respondents.

By the Court:

/s/ Dana H. Gallup
Clerk

[Cert. cc: Benefits Review Board and Messrs. Driscoll, Flannery and Mr. Carroll.]

APPENDIX B

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
Washington, D.C. 20210

[SEAL]

BRB No. 74-231

[Filed as part of the record Jul. 30, 1975, [illegible], Clerk, Benefits Review Board]

JOHN A. STOCKMAN
Claimant-Respondent

v.

JOHN T. CLARK & SON OF BOSTON, INC.

and

AMERICAN MUTUAL INSURANCE COMPANY
Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party in Interest

DECISION

Appeal from Decision and Order of Garvin Lee Oliver, Administrative Law Judge, United States Department of Labor.

Joseph P. Flannery (Kaplan, Latti and Flannery), Boston, Massachusetts, for claimant.

Henry W. Dardinski (Dudziak, Driscoll and Dardinski), Chestnut Hill, Massachusetts, for employer/carrier.

Maryanne S. Kane (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Acting Associate Solicitor), for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

This is an appeal by the employer and the carrier from the Decision and Order of Administrative Law Judge Garvin Lee Oliver (74-LHCA-219) awarding benefits to the claimant pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereafter referred to as the Act).

Claimant was employed by John T. Clark & Son of Boston, Inc., as a longshoreman. On October 1, 1974, he sustained a hernia while stripping a container at the Boston Army Terminal. The container had been removed from a vessel about three days earlier at Berth 17, Castle Island, and then moved to the terminal which was equipped for stripping.

To establish entitlement under the Act, a claimant who sustains an employment-related injury must satisfy the jurisdictional requirements of Sections 2(3), (4), and 3(a). 33 U.S.C. §§ 902(3), (4), and 903(a). The administrative law judge found that claimant had met these requirements and awarded him the applicable benefits under the Act. Petitioners challenge this finding of coverage. It is now well settled that a claimant, such as John A. Stockman, who is injured under the circumstances of this case is well within the jurisdictional reach of the Act. Claimant is an "employee" as that term is defined in Section 2(3). Certainly, if stuffing a container is maritime employment, stripping a container is maritime emplyoment. *Alvarez* v. *International Terminal Operating Co.*, 2 BRBS 16 (ALJ), 75-LHCA-19 (May

12, 1975). *See Brown* v. *Maritime Terminals Inc.*, 1 BRBS 212, 213, BRB No. 74-177, 74-177A (Dec. 6, 1974). The temporary-resting of the containers for three days prior to stripping does not alter the status of the claimant as engaged in maritime employment. *Avvento* v. *Hellenic Lines, Ltd.*, 1 BRBS 174, BRB No. 74-153 (Nov. 12, 1974). Additionally, the employer is an "employer" as that term is defined in Section 2(4) because it employs a person, the claimant, in maritime employment. *Brown* v. *Marine Terminals, Inc., supra.* Finally, the situs requirement of Section 3(a) is met because claimant was injured in a terminal. *Mildenberger* v. *Cargill, Inc.*, 2 BRBS 51, BRB No. 74-224 (July 3, 1975).

Accordingly, the Decision and Order of the administrative law judge is affirmed.

/s/ Ruth V. Washington
RUTH V. WASHINGTON
Chairperson

We concur:

/s/ Ralph M. Hartman
RALPH M. HARTMAN
Member

/s/ Julius Miller
JULIUS MILLER
Member

Dated this 30th day of July, 1975

APPENDIX C

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, D.C. 20210

[SEAL]

Case No. 74-LHCA-219

Formerly Case No. 1-11472

In the Matter of

JOHN A. STOCKMAN
Claimant

vs.

JOHN T. CLARK & SON OF BOSTON, INC.
Employer

AMERICAN MUTUAL INSURANCE COMPANY
Carrier

Joseph P. Flannery, Esquire
Kaplan, Latti, and Flannery
89 State Street
Boston, Massachusetts 02109
For the Claimant

Henry W. Dardinsky, Esquire
Quellette and Duziak
850 Boylston Street
Chestnut Hill, Massachusetts 02167
For the Employer and Carrier

Maryanne Kane, Esquire
(William J. Kilberg, Solicitor of Labor
James G. Johnston, Associate Solicitor)
United States Department of Labor
Washington, D.C. 20210
For the Director, Office of
Workers' Compensation Programs
Party in Interest

BEFORE: GARVIN LEE OLIVER
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim arising under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901 *et seq.*, (hereinafter referred to as the Act), and the Rules and Regulations implementing said statute, 20 C.F.R. Parts 701 and 702.

A hearing was held in this matter on August 6, 1974 in Boston, Massachusetts. The Claimant and the Employer and Carrier were represented by counsel and were afforded full opportunity to be heard, to adduce relevant evidence, to call, examine, and cross-examine witnesses, and to make oral argument and submit post-hearing briefs. Thereafter, counsel for all of the parties filed briefs which have been duly considered.

Issues

The issues presented for determination are (1) whether or not the claim for compensation comes within the purview of the Act, specifically (a) whether Claimant and his Employer were engaged in maritime employment at the time of Claimant's injury, under §§ 2(3) and (4) of the Act, respectively, and (b) whether Claimant was working in an area within the jurisdiction of the Act under § 3(a) of the Act, and (2) Claimant's average weekly wage at the time of the injury.

Based upon the entire record in this case, I make the following Findings of Fact, Conclusions of Law, and Order.

Findings of Fact

The parties have stipulated and agreed that on October 1, 1973, the Claimant, John A. Stockman, was

employed by John T. Clark and Son of Boston, Inc., as a longshoreman with collateral rating as a cooper and extra dock laborer: that, on said date, Claimant, during the course of "stripping" a Sea-Land container, while lifting cases to place them on a pallet, sustained a right inguinal hernia; that the Employer and the Carrier, American Mutual Insurance Company, accepted the liability for the injury and furnished medical care, including surgery, and paid workmen's compensation benetfis under the Massachusetts Workmen's Compensation Act for a period of seven weeks at the rate of $80.00 per week; and that Claimant's injury required a rating of temporary total disability for seven weeks commencing October 1, 1973. These agreements and stipulations are accepted and these facts are, therefore, taken as established.

In approximately 1967, Sea-Land Corporation and the Employer, John T. Clark, entered into a contract whereby John T. Clark was "to unload vessels as they come into port [and] discharge the containers." In the usual course of business in unloading a vessel there are a great number of containers with full loads for a particular concern that are placed under chassis and hauled away by truck to their ultimate destinations. Where, however, a container does not contain a full load for any one business concern, it must be "stripped" (unloaded) and separated by order.

There are no facilities at Berth 17, Castle Island, for stripping or stuffing containers. Thus, it was the custom and practice as of October 1, 1973 that any containers that had to be "stripped" (unloaded) were provided with chassis, hooked to a truck, and driven by an independent trucking firm[1] to Berth 5, Boston Army

[1] Arrangements for this trucking from Castle Island to the Boston Army Base were made by Sea-Land.

Base, another waterfront facility, approximately two miles by land and approximately 700-800 feet across the water from Castle Island. The Employer uses its facilities at the army base for stripping and stuffing containers and for general cargo operations. It holds itself out to be both a stevedoring concern and a terminal operator. Although the Employer also discharges vessels at the army base, Sea-Land's containers vessels are not discharged there because of the necessity of having a special container crane and a different type of berth than is available at the present time. Thus, Sea-Land containers were discharged at Castle Island and trucked two miles for "stripping" at the Employer's army base terminal.

At the time of his injury, Claimant was stripping a container; i.e., he was removing cargo from a container and placing it upon pallets inside the terminal. The container had been unloaded from a vessel within three days prior to his injury. The cargo thus "stripped" from the containers would be transported on pallets to the dock and, upon tender of the proper documents, would be delivered to truckers to be carried to its ultimate destination.

The Claimant has been a longshoreman for 30 years and has been so employed by John T. Clark for five years. His work for John T. Clark at the Boston Army Base terminal for the last three years has consisted primarily of stuffing and stripping containers and shifting cargo, rated as a cooper or extra dock laborer. Pursuant to an agreement between the International Longshoremen's Union and the Boston Shipping Association, of which the Employer is a member, the only persons allowed to strip or stuff containers within 50 miles of a waterfront are longshoremen. As the Boston Army Base is located on the waterfront, Claimant's employment at the time of his injury fell within the scope of this agreement.

The evidence establishes that Claimant earned $17,186.97 in wages in 1972 and $16,554.23 in wages in 1973, and was out of work during the latter year for seven weeks due to the injury. I find that using thirty-nine weeks of 1973 and thirteen weeks of 1972 the annual earnings between October 1, 1972 and October 1, 1973, the year immediately preceding the injury, was $18,643.64. Pursuant to § 10(d) of the Act, the average weekly wage is one fifty second part of the average annual earnings or $358.53 in this case.

Conclusions of Law

Prior to the 1972 amendment to the Act, situs requirements restricted coverage to injuries which occurred on the navigable waters of the United States, leaving shoreside injuries to State jurisdiction.[2] In the 1972 Amendments Congress expanded the situs test by providing that:

> Compensation shall be payable under the Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel.*[3] (Emphasis added).

Thus, Congress has modified the original situs requirement and has expanded the physical locality of the Act's jurisdiction to include injuries incurred on shoreside facilities.

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[2] 33 U.S.C. § 903(a), 44 Stat. 1426 (1927); Travelers Ins. Co. v. Shea, 382 F.2d 344 (5th Cir. 1967, cert. denied, 389 U.S. 1050 (1967), reh. denied, 393 U.S. 903 (1968); Nacirema Operating Co. v. Johnson, 396 U.S. 212, 90 S. Ct. 347 (1969), reh. denied, 397 U.S. 929 (1970).

[3] 33 U.S.C. § 903(a), 86 Stat. 1251 (1972).

In the case at hand, Claimant was employed to unload containers at Berth 5 of the Boston Army Base. Berth 5 adjoins navigable waters and is used for the general cargo operations of loading and unloading vessels, although the stripping of containers received from Berth 17, Castle Island is considered a terminal operation. Wharf and terminal areas are now specifically included under § 903(a) of the Act; therefore Claimant's injury at the army base terminal comes within the situs requirement for coverage under the Act. The fact that the container was not discharged at Berth 5 of the Boston Army Base, but was driven two miles by land from the other side of the channel to be unloaded does not change the geographical status of Berth 5 of the army base as a terminal adjoining navigable waters.

Federal jurisdiction is also present on the basis that the Employer's army base facilities constitute an "other adjoining area customarily used by an employer in . . . unloading . . . a vessel." The evidence was uncontroverted that it was customary for any and all Sea-Land containers that were to be stripped to be trucked from Sea-Land's Castle Island facilities to John T. Clark's adjoining facilities at the Boston Army Base. (Tr. 9). For the reasons discussed below, this was an integral step in the process of unloading a vessel.

Accordingly, I find that, from the standpoint of situs, this claim comes within the provisions of the Act.

If the Claimant is to prevail, he must also meet the status tests now imposed by the Act: he must, on the date of injury, have been an "employee" in the employment of an "employer", as these terms are defined in the Act. The 1972 Amendments to the Act contain the following definition of the terms, "employee," and "employer":

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker, ...
>
> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by the employer in loading, unloading, repairing, or building a vessel).[4]

As the Treasurer of the Employer testified, the Employer was engaged in the business of unloading vessels as they came into port and discharging the containers. The Employer also engages in general cargo operations and holds itself out to be both a stevedoring concern and terminal operators. The Employer hires longshoremen to perform some of this work. Thus, it must be concluded that the Employer (John T. Clark) is engaged in maritime operations and is an "employer" within the meaning of the Act, as amended. Cf. *Crampton* v. *Cargill Incorporated*, 74-LHCA-215, Judge Samuel J. Smith.

The Respondents contend that Claimant is not an "employee" within the meaning of § 3(a), 33 U.S.C. 903(a), of the Act as he was not "engaged in maritime employment." It has been stipulated that the Claimant is a longshoreman with a collateral rating as a cooper and extra dock laborer. Respondents point out that Claimant is also classified as a "freight handler." However, it is the nature of the work being performed, not the label given it by either party, which is determinative. *O'Leary*

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[4] 33 U.S.C. § 902(3), (4), 86 Stat. 1251 (1972).

v. *Coastal Nav. Co.*, 193 F.2d 717 (9th Cir. 1951); *Olvera* v. *Michelos*, 307 F. Supp. 9 (S.D. Tex. 1968).

It is uncontradicted that Claimant, at the time of his injury, was stripping a container, i.e., he was removing cargo from a container and placing it upon pallets inside the terminal. The container had been unloaded from a vessel within three-days prior to the injury. Cargo "stripped" from the container would eventually be transported on pallets to the dock and, upon tender of the proper documents, would be delivered to truckers to be carried to its ultimate destination.

Respondents contend that the container ceased to be cargo once it was unloaded from the vessel and was brought to rest on the pier. (Tr. 31). Since Claimant was not engaged in unloading the containers from the vessel to the pier, Respondents contend that his "job was no more maritime than that of any employee in an inland commercial warehouse." (Insurer's Brief, p. 4).

I reject the Respondents' contentions as they represent an overly technical and truncated view of the modern loading and unloading process. Cf. *Minninni* v. *Pittston Stevedoring Corp.*, 74-LHCA-222, Judge Patrick G. Geraghty. When Congress amended the Act and extended coverage, it recognized that the process of loading and unloading vessels has been modernized and must be considered pragmatically for purposes of coverage under the Act. The Senate Report pointed out that "with the advent of modern cargo-handling techniques, such as containerization . . . , more of the longshoreman's work is performed on land than hereto fore." [5]

The process of unloading a vessel cannot reasonably be held to be terminated once the cargo hits the pier.

[5] S. Rep. No. 92-1125, 92nd Cong., 2d Sess., 13, Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, (1972), 75.

Di Somma v. *John W. McGrath Corporation*, 74-LHCA-176, Judge Marshall E. Miller. Courts have rejected a hypertechnical or narrow construction of the loading and unloading process. *Garrett* v. *Gutzeit O/Y*, 491 F.2d 228 (1974); *Litwinowicz* v. *Weyerhauser Steamship Company*, 179 F. Supp. 812 (E.D. Pa. 1959); Cf. *Spann* v. *Lauritzen*, 344 F.2d 204 (1965).

In *Giacomo Avvento* v. *Hellenic Lines, Ltd.*, No. 74-153 (Benefits Review Board, November 12, 1974), the Benefits Review Board held that a longshoreman working as "extra labor" who injured himself while loading cases of sardines, taken from the ship four days earlier, onto a truck parked on the pier for inland delivery was engaged in maritime employment. The Board stated, "[I]t is clear that until cargo is delivered to a trucker or other carrier who is to pick it up for further transshipment, such cargo is in maritime commerce and all employees engaged in its movement to that point are engaged in maritime employment." See also *Powell* v. *Cargill, Inc.*, 74-LHCA-172 (October 8, 1974), Judge Marshall E. Miller.

In the circumstances of the containers in this case, that had to be stripped and the contents separated by order for further trans-shipment, the products moving in the stream of maritime commerce were not only the containers, but the contents thereof. Until the contents were removed from the containers the unloading procedure had not been completely executed. The unloading of this container was an integral and sequential part of the process of unloading cargo from a vessel. Cf. *Powell* v. *Cargill, Inc., supra; Richardson* v. *Great Lakes Storage & Contracting Co., et al*, 74-LHCA-223 (October 18, 1974), Judge Patrick G. Geraghty.

The fact that the containers had to be trucked two miles across the channel for unloading is not significant. The

containers, at this point, were not being picked up from storage for further trans-shipment, but were merely being transported for unloading. If the containers had been stripped by longshoremen at the Castle Island facility where they arrived, this work activity would, in my view, have been c'early covered by the Act. Claimant should not be denied the protection and coverage of the Act merely because circumstances required his Employer to have longshoremen perform the stripping function at another waterfront facility two miles away. Cf. *Crampton* v. *Cargill, Incorpora'ed*, 74-LHCA-215, Judge Samuel J. Smith. Such a finding would not be within the humanitarian goals of the Act.

Upon consideration of the entire record and the applicable precedents, I hold that the Claimant was injured in a shoreside area while he and his Employer were engaged in maritime employment within the coverage of the Act.

Accordingly, Claimant is entitled to compensation for temporary total disability under the Act for a period of seven weeks commencing October 1, 1973 as well as an additional award of reasonable attorney's fees under § 28 of the Act. The Claimant's average weekly wage on October 1, 1973 was $358.53 per week, therefore, he was entitled to the maximum weekly benefit of $210.54 per-week for seven weeks, with 6 percent interest from the date that each weekly payment became due until paid, less the amount paid by the Employer and Carrier under Massachusetts Workmen's Compensation Act.

Counsel for Claimant has requested approval of a fee for legal services in the amount of $725.00 which I deem to be reasonable and hereby approve pursuant to 20 CFR § 702.152.

Based upon the foregoing findings of fact and conclusions of law, I make the following:

COMPENSATION ORDER

1. The Employer and Carrier shall pay to the Claimant compensation for seven weeks temporary total disability at the rate of $210.54 per week commencing October 1, 1973 with 6 percent interest from the date that each weekly payment became due until paid, less any sums paid by them under the Massachusetts Workmen's Compensation Act.

2. The Employer and Carrier shall further pay directly to Joseph P. Flannery, Esq., attorney for the Claimant, the sum of $725.00 as reasonable attorney's fees.

/s/ Garvin Lee Oliver
GARVIN LEE OLIVER
Administrative Law Judge

Dated: November 25, 1974
Washington, D.C.

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 75-1659, 75-2833, 75-2289, 75-2317 and 75-4112

JACKSONVILLE SHIPYARDS, INC., and
AETNA CASUALTY & SURETY COMPANY,
Petitioners,

v.

HERBERT L. PERDUE and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

JACKSONVILLE SHIPYARDS, INC., and
AETNA CASUALTY & SURETY COMPANY,
Petitioners,

v.

CHARLES W. SKIPPER and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

P. C. PFEIFFER COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

DIVERSON FORD and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

HALTER MARINE FABRICATORS, INC., and
FIDELITY & CASUALTY OF NEW YORK,
Petitioners,

v.

JOHN L. NULTY and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

WILL BRYANT and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

Sept. 27, 1976

Petitions for Review of Orders of the Benefits Review Board, United States Department of Labor.

Before TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.*

TJOFLAT, Circuit Judge.

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* Judge Thornberry was a member of the panel that heard oral arguments but due to illness did not participate in this decision. 28 U.S.C. § 46(d) (1970).

I

AN OVERVIEW OF THESE CASES

The Parties and Their Dispute. With these five vigorously contested appeals, petitioners and respondents join battle for the third time. Each individually named respondent is a shoreside worker who was injured in the course of his employment. These respondents claim that their injuries are covered by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. §§ 901 *et seq.* (1970). In their fight for coverage, the workers have a new and virtually untested weapon, *viz.*, those portions of the 1972 Amendments which expanded the scope of the Act.[1] They also have a powerful and articulate ally in the other respondent, the Director of the Office of Workers' Compensation Programs of the United States Department of Labor (the Director).[2] The forces arrayed against respondents consist of the workers' employers and the employers' insurance carriers.

Procedural History. In each of the cases, a preliminary skirmish was fought before an Administrative Law Judge.[3] Reports from these battlefields show mixed results; petitioners won three of the engagements, and respondents two. The theater of operations then shifted to the Washington, D.C. headquarters of the Benefits Review Board of the Department of Labor (the Board).[4] The Board adopted an extremely liberal view of the Act's coverage, and respondents swept to victory in all five cases. After losing the fight in Washington, D.C., petitioners chose to escalate the conflict by asking this Court to review the Board's decisions.[5]

The Issues on Appeal. Before this Court, the lines of battle have been drawn with admirable clarity and good sense. Both sides have declined to assume certain exposed legal positions where they would quickly fall prey to the enemy's fire. Thus, respondents concede that the five accidents would not have been covered by the pre-1972 Act. Similarly, petitioners concede that the 1972 Amendments have broadened the Act's scope to include *some* shoreside injuries. The issue which divides the two camps is, of course, whether the Act was expanded far enough to reach *these* five injuries. We hold that the Board properly awarded benefits to two workers who were handling maritime cargo on shore, as well as to a carpenter who was fabricating parts for a new ship. However, the Board misconstrued the Act in extending coverage to the other two respondents, a shipboard worker who

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[1] Especially pertinent are new Sections 902(3) (definition of "employee"), 902(4) (definition of "employer"), and 903(a) (expanded situs provision in new Act). Despite the fact that more than three years have passed since the Amendment's effective date, litigation over the Act's new coverage is just now beginning to reach the courts. *See Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975). *See also I. T. O. Corp.* v. *Benefits Review Bd.*, 529 F.2d 1080 (4th Cir. 1975), *rehearing en banc granted* (4th Cir. Mar. 12, 1976).

[2] As shall appear *infra*, there is a dispute as to whether the Director is a proper party respondent in this Court, or whether his status is merely that of *amicus curiae*. In Part V of this opinion, we hold that the Director is a proper respondent.

[3] New Section 919(d) provides that evidentiary hearings shall be held before hearing examiners. The administrative regulations relating to the Amendments make it clear that such hearing examiners are to be Administrative Law Judges. *See* 20 C.F.R. § 702.332 (1975).

[4] Pursuant to Section 921(b)(3) of the new Act, the Benefits Review Board is authorized to hear appeals by any party in interest from the Administrative Law Judge's orders. The Board must base its decision upon the hearing record and is bound by a "substantial evidence" standard in its review of findings of fact. *Id.*

[5] Jurisdiction over these appeals is conferred upon us by Section 921(c) of the new Act. Thereunder, a party aggrieved by a final order of the Board may obtain review of that order in the Court of Appeals for the federal judicial circuit in which the employee's injury occurred.

stumbled in front of his employer's office a mile from the ship, and an employee who was helping to tear down a shed in a disused marine repair facility.

Not content with merely jousting over the scope of the revised Act, three of the petitioners have broken ranks to seek out other *casus belli*. The petitioners in the *Halter Marine* case argue that the Act is unconstitutional if it covers injuries to shipbuilders on shore. In *Pfeiffer*, we are told that the Board violated the petitioners' right to due process by the method in which it awarded a fee to the claimant's attorney. The *Ayers Steamship* petitioners enter the lists with a plan to split the enemy forces; they claim that the Director is not a proper respondent in these appeals. As will hereinafter appear, we reject all of these additional contentions.

II

SCOPE OF THE 1972 AMENDMENTS

Of the many changes which Congress made in the Act in 1972, we are here concerned with only one: the extension of the Act's coverage inland to reach certain maritime-related injuries. Under the prior Act, coverage was overwhelmingly situs-oriented. As a general rule, an employee's injury was compensable if it occurred "upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law . . .".[6] Interpretation of this provision was immensely complicated by a judicially created doctrine under which some "maritime but local" injuries

[6] See former 33 U.S.C. § 903(a). There were certain exemptions from coverage, all of which have been carried over into the new Act. See *id., as amended,* § 903(a)(1) (masters and crew members: persons engaged by masters to service vessels under eighteen tons net); *id.* § 903(a)(2) (government employees); *id.* § 903(b) injuries caused solely by the employee's intoxication or willful conduct).

could be covered by both state and federal compensation schemes. *See, e.g., Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962); *Davis* v. *Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942). However, the Supreme Court made it clear that, whatever the exact parameters of the "maritime but local" doctrine, the federal Act would generally be confined to injuries occurring over the waters. Thus, in *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 371 (1969), the Court held that the Act did not cover injuries to longshoremen who were working on a pier permanently affixed to the shore. Coverage was denied despite the fact that the workers had been injured while loading and unloading ships, an employment as maritime in nature as any land-based employment could be.[7] The inequities of this "water's edge" division between covered and noncovered work were a major factor behind the decision to expand the scope of the Act.[8]

Two of the Act's new sections are pertinent to the present appeals.[9] The first of these defines the status

[7] Further underscoring the maritime context of these injuries was the fact that the injuries were caused by ships' cranes which had swung out of control. 396 U.S. at 213-14, 90 S.Ct. 347.

[8] *See* H.R. No. 92-1441, 1972 *U.S. Code Congressional & Administrative News* at 4707.

[9] None of the employers denies that it is an "employer" within the meaning of new Section 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

In any event, it is clear that this section requires merely that an employer have at least one employee engaged in "maritime employment" (the requirement of new Section 902(3)'s definition of an "employee") on the situs defined in new Section 903(a). Thus, if a claimant can satisfy Sections 902(3) and 903(a), his employer is automatically brought within Section 902(4).

which the affected employee must occupy to bring his injury within the Act's coverage:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . . 33 U.S.C. § 902 (3).

The other provision describes the situs where a covered injury must occur:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). *Id.* § 903(a).

From these statutes, the general thrust of the new Act's coverage is clear. Congress has replaced the old "water's edge" analysis with a two-part test which requires (1) that the claimant have been engaged in "maritime employment" and (2) that the injury have taken place upon the situs specified in the Act.

The Act's definition of "maritime employment" is the focus of most of the legal controversy which rages in the parties' voluminous briefs. Unfortunately, much of this learned debate is of little relevance, if any, to the cases now before this Court. Counsel have drawn our attention to a host of pre-1972 decisions which discussed the meaning of the term "maritime employment" as used in the former Act. *See, e.g., Pennsylvania R. R.* v. *O'Rourke*, 344 U.S. 334, 73 S.Ct. 302, 97 L.Ed. 367 (1953); *Nalco Chemical Corp.* v. *Shea*, 419 F.2d 572 (5th Cir. 1969).

Under the old Act, as under the present one, an employer was liable if he had one or more employees engaged in "maritime employment".[10] However, judicial constructions of the pre-1972 Act were necessarily limited by the "water's edge" approach of that statute.[11] For this reason, these older cases simply do not speak to the issue of what land-based employment is sufficiently "maritime" to be covered by the new act.[12] Fortunately, Congress itself has answered that question. The terms of the statute allow coverage for an injured employee who was working as a longshoreman, a ship repairman, a shipbuilder, or a shipbreaker.[13] The legislative history tells us that an injured employee will be covered if he was "engaged in loading unloading, repairing, or building a vessel",[14] but will not be covered merely because he was

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[10] Compare old 33 U.S.C. § 902(4) with new 33 U.S.C. § 902(4). As we have indicated, *supra* note 9, the only way to read the new Act consistently is to give the words "maritime employment" in new Section 902(4) the same meaning as in new Section 902(3).

[11] Not only, as noted was the "water's edge" doctrine applied to the situs of the claimant's injury, but the "maritime employment" of the employer's workers was required to take place "upon the navigable waters of the United States (including any dry dock)". See old 33 U.S.C. § 902(4).

[12] The commendable diligence of counsel has uncovered some scattered dicta which might be read as suggesting the general nature of "maritime" work. *See, e.g., Pennsylvania R.R.* v. *O'Rourke, supra*, 344 U.S. at 339-40, 73 S.Ct. 302. These occasional pronouncements by the courts have, at best, only the most tenuous connection with the 1972 Amendments' extension of coverage to shoreside injuries. In comparison with the statutory language itself and the legislative history, the timeworn dicta which are urged upon us are entitled to little weight. Also, we note that none of the instant appeals involves an injury which occurred over the waters. Therefore, we need not, and do not, decide if the new Act made any changes in the coverage of such injuries.

[13] 33 U.S.C. § 902(3).

[14] In light of the statutory language, we regard the omission of shipbreaking from this passage as inadvertent.

injured in the area defined by new Section 903(a).[15] In light of these indicia of Congressional intent, we must agree with the Court of Appeals for the Ninth Circuit that the new Act requires such a claimant to have been engaged in the work of loading, etc. *at the time of the injury. Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957, 960 (9th Cir. 1975). We therefore reject respondents' contention that an employee's general job classification (such as "longshoreman" or "ship repairman") will bring him within the Act's coverage regardless of the nature of the work which he was performing when he was injured.[16] In its reports, Congress has also indicated the extent to which coverage should be granted to persons who are not themselves loading, unloading, repairing, building, or breaking a vessel but who are nevertheless performing closely related functions. Thus, the House Report states that a checker would be performing covered work if he was "*directly involved* in the loading or unloading functions . . .".[17] Our holding is that an injured worker is a covered "employee" if at the time of his injury (a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was "directly involved" in such work.[18]

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[15] "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." H.R. No. 92-1441. 1972 *U.S. Code Congressional & Administrative News*, at 4708.

[16] For the same reason we also cannot accept the notion that the official name of an employee's union or the language of a union's jurisdictional agreement is dispositive of the issue of coverage. It is the employee's work at the time of the injury which controls.

[17] *Id.* (Emphasis supplied.) The same report also states that clerical employees who do not "participate in the loading or unloading of cargo" would not be covered by the new Act. *Id.*

[18] *See* Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments*, 6 Journal of Maritime Law and Commerce, 1, 10 (1974). By this holding, we do not

We specifically reject a theory which petitioners in the *Pfeiffer* and *Ayers Steamship* cases advance as the proper rule for cargo handling operations. They claim that the Act's coverage depends upon whether cargo has reached its shoreside "point of rest", as that term is used in the maritime industry.[19] To these petitioners, men who are handling cargo on its way to a vessel are not covered by the Act until that cargo reaches its last marshaling area prior to being taken on board a ship. Similarly, under this theory men who are unloading cargo from ships are performing covered work only until they reach the first marshaling area for cargo on shore. We are unable to find any support for such a hypertechnical construction of the 1972 Amendments.[20] In our view, if Congress had wished to adopt the "point of rest" as the test for coverage, it would have made that intention clear. As it is, the "point of rest" analysis is to be found neither in the statute itself nor in the legislative history. The closest approach to such a test appears in the following passage from the House Report:

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mean to suggest that future cases may not bring to light other types of covered work which cannot be characterized as loading, unloading, repairing, building, or breaking, and which are not "directly involved" with these five types of work, but which nevertheless are sufficiently similar to fall within the Congressional scheme. No such additional category of covered work appears in the cases before us, but we will not foreclose the possibility of such categories arising in future litigation.

[19] The Federal Maritime Commission has defined the "point of rest" as follows:

> For the purpose of this section, "point of rest" shall be defined as that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading. 46 C.F.R. § 533.6(c) (1975).

[20] A narrowly technical construction of the Longshoremen's and Harbor Workers' Compensation Act has traditionally been disfavored. *See, e.g., Luckenbach S.S. Co.* v. *Norton*, 106 F.2d 137, 138 (3d Cir. 1939).

> To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area . . . [E]mployees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered . . . H.R. No. 92-1441, 1972 *U.S.Code Congressional & Administrative News*, at 4708.

In our opinion, these remarks establish no more than that workers who bring cargo to a storage area from on board ship are covered, while those persons (generally truckers or railroad personnel) who merely receive cargo and transport it inland are not covered. The House Committee in this passage did not even mention those employees who handle cargo between the first holding area and the cargo's departure via land transportation. It is precisely the treatment of this intermediate group of workers with which we are here concerned, and this passage is totally silent as to them. Elsewhere, as we have seen, the Committee indicated that employees who are directly involved in loading or unloading will be covered by the new Act. In the absence of explicit language which would establish a "point of rest" dividing line for shoreside cargo handlers, we will apply this general test to them as well.[21]

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[21] In deciding how to interpret the Amendments and their legislative history, we have remembered that this Act is to be liberally construed in favor of injured employees. *See Voris* v. *Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953). In our view, this principle requires us to resolve doubts as to the new Act's coverage in favor of a particular group of workers such as cargo handlers landward of the "point of rest".

Brief mention should also be made of the House Committee's announced intention "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity", H.R. No. 92-1441, *supra*, at 4708. We agree that here the Committee was speaking of one inequity of the old "water's edge" approach, under which cargo handlers would walk in and out of coverage as they moved between ship and shore. However, we see no reason to treat this statement as a comprehensive description of the new Act's coverage, with the result that only those workers who spend part of their days upon the waters would be covered. In this passage, the Committee was merely addressing itself to one anomaly which it wished to eliminate. The same paragraph clearly states that checkers would be covered by the new Act, and the Committee gave no indication that coverage would depend on whether the checkers went on board ship. The test, rather, was to be whether they were "directly involved in the loading or unloading functions". *Id.*

Our interpretation of the new situs provision follows the same general lines as our construction of Section 902 (3). Just as we choose to ignore the labels which an employer or a union has bestowed upon an employee, and instead rely upon the employee's work function at the time of the injury, likewise we will look past an area's formal nomenclature and examine the facts to see if the situs is one "customarily used by an employer in loading, unloading, repairing or building a vessel." The clear statutory scheme is to cover employees who are injured while performing certain types of work in an area which is customarily used for such work. Whether or not an employer or local custom has decided to designate an area as a "terminal", for example, is not dispositive of the situs issue. We will require that a putative situs actually be used for loading, unloading, or one of the other functions specified in the Act. As with the "maritime employment" test, we also interpret the Act as requiring that the situs meet the statutory requirements as of the time of the injury. It will not suffice if the area was so used only in the past, or if such uses are merely contemplated for the future.

III

THE COVERAGE ISSUE IN THESE APPEALS

With the general tests for the amended Act's coverage in mind, we now turn to the specific facts of each of the present cases. In deciding each appeal, we must remember that the Act is to be liberally construed in favor of injured workers, *see Voris* v. *Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953). We are also bound by a statutory presumption that an individual claim comes within the Act's coverage. Title 33, United States Code, Section 290(a). Finally, we will not set aside an award made by the Benefits Review Board so long as it is supported by substantial evidence on the record considered as a whole, and so long as there is a reasonable legal basis for the Board's conclusions. *See O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508, 71 S.Ct. 470, 95 L.Ed. 403 (1951); *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469, 478-79, 67 S.Ct. 801, 91 L.Ed. 1028 (1947).[22]

A. *No. 75-1659.* Herbert Perdue was employed by Jacksonville Shipyards, Inc., as a shipfitter. On February 2, 1973, he performed repair work for a twelve-hour shift (7:00 a.m. to 7:00 p.m.) aboard an aircraft carrier which was berthed at the Mayport Naval Station in Jacksonville, Florida. At the end of the working day, Perdue took a bus to an office which his employer maintained approximately one mile from the carrier. The bus was provided by Perdue's employer, and the office was the place where Perdue had to "punch out" on a time clock before and after each shift. While alighting from the bus near the office, Perdue stumbled and injured his left knee in a fall

[22] Although these cases were decided under the old Act, which provided for administrative adjudication by a deputy commissioner and for judicial review by a United States District Court, petitioners have offered no reason why the standard of review should be different under the present Act.

upon the pavement. In our view, the Board should have sustained the Administrative Law Judge's determination that Perdue was not injured on a situs defined by new Section 903(a). There is literally nothing in the record to support a conclusion that the employer's office was on the navigable waters or in an "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." The vessel upon which Perdue was working was a mile away, and the "punch out" office was a purely clerical and administrative post separated from the waters by other facilities which likewise were not used for loading, unloading, ship repair, or shipbuilding.[23] Under no reasonable construction of the Act did this area either "adjoin" the waters or carry out any of the functions specified in Section 903(a). We reject the argument that the new Act covers every point in a large marine facility where a ship repairman might go at his employer's direction. In the words of the Administrative Law Judge below, the locus of this injury had "nothing to do with loading, unloading, building or repairing vessels" (Appendix, at p. 19). Therefore we must reverse the Board's determination that Perdue is entitled to compensation under the new Act.

B. *No. 75-2833.* Charles W. Skipper was another employee of Jacksonville Shipyards, Inc. For many years, he had been primarily engaged in ship repair work as a welder and burner. On the morning of February 8, 1974, Skipper reported for work as usual. However, instead of being assigned to his normal duties as a ship repairman, he was sent across the St. Johns River to a disused marine facility called the Southside Yard. There, he was to assist in tearing down a building which had formerly housed a fabrication shop. The purpose of dismantling this structure was to salvage some steel for use in con-

[23] The parties have stipulated that the nearest body of water was 500 yards away from the office.

structing a plant which would manufacture sandblasting equipment. The activities of Jacksonville Shipyards, Inc., are quite diversified, and the contemplated plant was a new business venture. Skipper himself had previously from time to time been assigned work, such as this salvage operation, which did not involve ship repair. On the day in question, Skipper was injured when some beams fell from the structure during the dismantling process and several steel fragments struck his forehead. At the time of the injury, all of the shops in the Southside Yard were closed, and no repair or fabrication work was being carried out there. Occasionally, ships would still be tied up at the pier in the Southside Yard, and repairmen or other workers would be sent from the employer's active facilities to work on these ships. However, such work would have no relationship to the various disused facilities in the Southside Yard, including the former fabrication shop in question, which was located between one hundred fifty and two hundred feet from the water. On these facts, we perceive no basis for the conclusion below that Skipper's injury is compensable under the new Act. Under no reasonable view was Skipper performing ship repair work at the time of his injury, nor was he carrying out any other of the types of work which the statute specifies as "maritime employment". We further hold that this salvage gang was not engaged in any work sufficiently similar to the statutory categories to be seen as a type of shoreside employment which was fairly within Congress' intent despite not being named in the 1972 Amendments. As we have already indicated, we refuse to attach controlling weight to an employee's regular job classification. Therefore, we will not consider Skipper a "ship repairman" under Section 902(3) merely because he normally performed ship repair work. We look only to his duties at the time of the injury, and these were decidedly not within the contemplation of the statute.

It is equally clear that Skipper was not injured on a situs as defined in new Section 903(a). We have held that under Section 903(a) a covered situs must be "customarily used by an employer in loading, unloading, repairing, or building a vessel" *as of the time of the injury*. In this case, the Southside Yard shops had been inactive for approximately a year when Skipper was injured. No repair work or any other work specified by the statute was being performed in these buildings. Therefore, we must conclude that the former shops had lost their status as ship repair or shipbuilding facilities, and that Skipper was not injured on a Section 903(a) situs.

Because we reverse the administrative finding of coverage under the Act, we need not reach the other issues discussed by the parties, such as the propriety of the award which Skipper received for a facial scar and the various requests which the claimant's lawyers have made for attorneys' fees.

C. *No. 75-2289.* In this case, the parties agree that the situs of the injury was within the contemplation of new Section 903(a), and the only dispute is whether the claimant was performing covered work. On April 12, 1973, Diversion Ford was injured at the port of Beaumont, Texas, while helping to secure a military vehicle to a railway flat car in preparation for its transportation inland. The vehicle in question had arrived either two or seventeen days prior to the date of the accident. Since then, it had remained in the immediate waterfront area. On the day before the injury, a gantry crane at the water's edge had lifted the vehicles onto the flat cars. Ford's work of fastening the vehicles to the flat cars was therefore the last step in transferring this cargo from sea to land transportation. On the other hand, the vehicles were not moved directly from the ship to the flat cars but instead were taken first to a storage

area. There is no dispute, then, that the "point of rest" for these vehicles had intervened since their arrival in port. However, we have today chosen not to adopt the "point of rest" theory of coverage for shoreside cargo handlers. In addition to the general reasons which we have already given for our conclusion, we cannot overlook the injustices which the proposed test would create in a case like this one. Petitioners apparently concede that Ford would be covered if his work were part of a continuous operation which began with the cargo's departure from a ship's hold. As respondents correctly point out, we are being asked to deny coverage purely because of a discontinuity in time created by the cargo's having been stored for a while along the shore. In contrast, under the test which we have adopted a shoreside worker like Ford would be covered if he was directly involved in "longshoring operations" such as unloading a ship. The work which Ford was performing was evidently an integral part of the process of moving maritime cargo from a ship to land transportation. Accordingly, we perceive an ample basis for the Board's determination that Ford was performing covered work, and we therefore affirm that decision.[24]

D. *No. 75-2317.* On July 30, 1973, John L. Nulty was employed as a carpenter at a shipyard in Moss Point, Mississippi. At the time of his injury, Nulty was building a piece of woodwork which was to be installed in a new ship that had been launched but not yet commissioned. The ship was berthed about 300 feet from the fabrication shop where Nulty was working. The part which Nulty was fabricating was designed to hold a

[24] Petitioners' briefs are rich in references to the title of Ford's union (which was the "warehousemen's" rather than the "longshoremen's" union) and to the jurisdictional agreement between the two unions. As we have already indicated, we do not regard such matters as dispositive; instead, we look to the duties which a claimant was performing at the time of his injury.

spare wheel on board the new ship. Most of Nulty's work was performed in the shop, although at times he would go on board a vessel to take measurements, or to install or repair some woodwork. The parties agree that a fellow employee known as a "shipfitter" would have picked up and installed the item which Nulty was building when he was injured. Under these facts, the Administrative Law Judge and the Benefits Review Board found that Nulty was working as a "shipbuilder" at the time of his injury and thus satisfied Section 902(3)'s definition of covered work. In our view, the only reasonable conclusion is that Nulty was directly involved in an ongoing shipbuilding operation. Under the test which we have adopted, then, Nulty is entitled to compensation under the new Act. We accordingly affirm the Board's finding of coverage.

E. *No. 75-4112.* On May 2, 1973, Will Bryant was injured while working as a "cotton header" in a warehouse immediately adjacent to a pier in Galveston, Texas. At the port of Galveston, loads of cotton are first deposited at various shoreside warehouses by the inland shippers. The cotton is then placed upon dray wagons and taken to pier warehouses such as the one where Bryant was injured. The work performed by Bryant and other "cotton headers" is to unload the bales of cotton and stack them in pier warehouses. Two local unions, known to many as "cotton header's" and "longshoremen's" locals, have strictly divided waterfront operations between them. Generally, the cotton remains in these warehouses until other employees from the "longshoremen's" union take it on board ship. This storage period may last from less than one day to several weeks, although the average interval is about one week. At times, the cotton will be moved from one pier warehouse to another before being taken to a ship. In such cases, dray wagons are again used to carry the cotton, and "cotton headers" unload these wagons at the receiving ware-

house. Occasionally, the cotton is moved directly from a dray wagon to a ship, in which event the work is performed solely by "longshoremen". The cotton which Bryant was handling at the time of his injury remained in the same warehouse for five days before "longshoremen" arrived to take the cargo aboard a vessel. On these facts, we affirm the Board's conclusion that the injury sustained by Bryant is within the Act's coverage. The situs was a pier-side warehouse in which cotton is stored temporarily before being taken on board ships. Usually, the cargo is taken directly from the warehouse to a ship. It is clear that Bryant was working on a waterfront area "customarily used by an employer in loading . . . a vessel", and that therefore the requirements of Section 903(a) are met. We also will not set aside the Board's determination that Bryant was performing the work of an "employee" as defined in Section 902(3). We have already noted the established principle of liberal construction of this Act, and the statutory presumption that a claim is within the Act's coverage. Also, we are bound to respect the Board's conclusions if they are supported by the record and if they have a reasonable legal basis. In view of the limited nature of our review, we cannot say that the Board erred in defining Bryant's work status. As we here reiterate, we reject the notion that a "point of rest" such as the pier-side warehouse in this case marks the division between covered and uncovered work. We have no doubt that Bryant would be directly involved in "longshoring operations" if, instead of setting the cargo down, he had handed it to a "longshoreman" for immediate loading on board a ship. The brief discontinuity in time created by the cotton's temporary storage did not alter the essential nature of Bryant's work, which was an integral part of the ongoing process of moving cargo between land transportation and a ship. Clearly, there is adequate support for a conclusion that Bryant was directly involved in "long-

shoring operations" and therefore falls within the terms of Section 902(3). Thus, we affirm the Board's decision that the injury in this case is covered by the new Act.[25]

IV

A CONSTITUTIONAL QUESTION

It is earnestly argued by Halter Marine Fabricators, Inc., and its insurance carrier, that the new Act is unconstitutional insofar as it extends coverage to shipbuilding employees who are injured on land. We are reminded that traditionally a contract to build a ship has not been considered to be within the admiralty jurisdiction,[26] and that admiralty has traditionally included only those torts which occur upon the waters.[27] In the *Halter Marine* case, the employee was injured while working on land in furtherance of a shipbuilding operation. Therefore, we are told, Congress has exceeded the fixed boundaries of admiralty jurisdiction by covering work under a nonmaritime contract which is performed on a situs outside the scope of traditional tort jurisdiction. In essence, the argument is that the sum of traditional admiralty tort and contract jurisdiction defines the absolute limits within which Congress may legislate under the Admiralty Clause.[28] We disagree with this proposition. No au-

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[25] Once again, we refuse to base our decision upon the designations of the two waterfront unions as "cotton header's" and "longshoremen's" or upon the terms of their jurisdictional agreements. Compare note 24, *supra*.

[26] *See, e.g., Thames Towboat Co.* v. *The Francis McDonald*, 254 U.S. 242, 243, 41 S.Ct. 65, 65 L.Ed. 245 (1920).

[27] *See, e.g., Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972).

[28] Art. III, Section 2 of the Constitution extends the federal judicial power "to all Cases of admiralty and maritime Jurisdiction. . ." This clause has always been construed as empowering

thority supports the notion that, in enacting a uniform compensation scheme for waterfront employees Congress must find a "contract" or "tort" peg upon which to hang its legislation. The true analysis to be applied to such statutes is quite different. It must begin with the long-standing judicial recognition of Congress' broad powers to expand the reach of admiralty jurisdiction. Contrary to the impression created by petitioners' briefs, such judicially authorized expansion has often been geographical in nature. *See, e.g., The Genesee Chief*, 12 How. 443, 13 L.Ed. 1058 (1851), *overruling The Thomas Jefferson*, 10 Wheat. 428, 6 L.Ed.358 (1825) (abandoning former limitation of admiralty jurisdiction to the tidewaters). The cases which approve the many changes which Congress has made in admiralty jurisdiction are replete with statements such as the following:

> The authority of the Congress to enact legislation of this nature [the Ship Mortgage Act, 46 U.S.C. §§ 911 *et seq.*] was not limited by previous decisions as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned . . . *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 52, 55 S.Ct. 31, 41, 79 L.Ed. 176 (1934).

The Supreme Court has also consistently followed the view that this Congressional power "permits of the exercise of a wide discretion". *Panama R. R. Co.* v. *Johnson*, 264 U.S. 375, 386, 44 S.Ct. 391, 394, 68 L.Ed. 748 (1924). Our conclusion is that, in the exercise of its discretion, Congress could properly determine that "new conceptions of maritime concerns" justified the extension

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Congress to legislate in maritime matters. *See, e.g., Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 361, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959).

of compensation coverage to workers in the immediate waterfront area who participate in an ongoing shipbuilding operation. As the legislative history makes clear, Congress was concerned that under the former Act maritime workers were covered over the waters but not covered while performing similar or related work on shore. The inequities of the pre-1972 Act in this regard are obvious, and we feel that this concern was a legitimate reason for Congress to exercise its discretion. We also feel that this concern was a "maritime" one within the meaning of the Admiralty Clause. We have already indicated that, in defining "maritime" concerns, we will not be limited by the rules which apply to tort and contract litigation. In the present case, we are not considering whether Congress would authorize suits upon shipbuilding contracts or whether land-based torts could be made actionable by an admiralty statute.[29] We deal only with the case before us, and in our view Congress could reasonably have felt that shipbuilding employees beside the navigable waters were performing a sufficiently maritime function to be covered by a revamped harbor workers' compensation statute. We therefore cannot conclude that Congress exceeded its broad discretion by extending coverage to such work.[30]

V

DIRECTOR A PROPER RESPONDENT

This issue is before the Court in rather an odd fashion. In their main brief on appeal, the *Ayers Steamship* petitioners allege that the Director of the Office of Workers' Compensation Programs, United States Department of

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[29] *See* 1 A *Benedict on Admiralty* § 94, at 5-15 (6th ed. 1973).

[30] Because of our disposition of this issue, we need not reach the question of whether the 1972 Amendments were an exercise of Congress' power under the Commerce Clause as well as under the Admiralty Clause.

Labor, is not a proper respondent in this Court, although he could appear as *amicus curiae*. We decline to consider the merits of this contention. First, we note that petitioners have never moved to dismiss the Director as a respondent. In our view, the relief which petitioners seek—dismissal of the Director as a party and addition of him as *amicus curiae*—is properly requested by a motion pursuant to Rule 27 of the Federal Rules of Appellate Procedure. Under that Rule, a motion is the appropriate vehicle for making "an application for an order or other relief", a category which clearly includes the request which petitioners have made for the first time in their brief. Furthermore, even assuming that petitioners have adequately raised this point, we cannot overlook the fact that in the two *Jacksonville Shipyards* cases another panel of this Court has granted motions by the Director to be added as a party respondent. These legal determinations that the Director may properly appear as a respondent must be respected by this Court. As a general rule, one panel cannot overrule the precedents set by another panel, absent some intervening factor such as a new controlling decision of the Supreme Court. See *Davis* v. *Estelle*, 529 F.2d 437, 441 (5th Cir. 1976). No such factor is present in this case, and we will therefore allow the Director to remain before this Court as a respondent.

VI

DUE PROCESS

In the *Pfeiffer* case, the Benefits Review Board awarded an attorney's fee to counsel for the successful claimant. The fee covered only the work which was performed before the Board, and the manner of its award was as follows. Pursuant to the applicable regulation[31] counsel

[31] 20 C.F.R. § 702.132 (1975). The statutory basis for this regulation is 33 U.S.C. §§ 928(a) & (c), *as amended*.

presented his request for an attorney's fee, supported by a complete statement of the services which had been performed. Finding a fee of $1,000 to be "fair and reasonable for the work done in connection with these appeals", the Board approved an award in that amount, remanding the case to the Administrative Law Judge for determination of a fee for counsel's services at that level. Petitioners opposed the award, arguing that counsel had not "properly proved" the reasonableness of the fee and that petitioners should have an opportunity to offer evidence and to cross-examine counsel on the amount of his fee. The evidentiary hearing which they requested was alleged to be a requirement of the Fifth Amendment's Due Process Clause. The board rejected these arguments, and so do we. Government officials are, of course, required to minimize the risks of error and unfairness in the procedures by which one is deprived of life, liberty, or property. *See, e.g., Goss* v. *Lopez*, 419 U.S. 565, 581, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 609-10, 618, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). We feel that these risks were adequately minimized by the procedures which the Board followed. The Board was clearly able to evaluate the services which counsel performed before it. It was the Board which read counsel's briefs and observed his representation of the claimant in the administrative appeal. Thus, the fee which the Board granted was carefully limited to those services of which it had first-hand knowledge. Especially in view of the extremely generalized nature of petitioners' attack upon the fee's reasonableness, we cannot say that disposing of petitioners' objections without an evidentiary hearing was a violation of the Due Process Clause.

VII

CONCLUSION

For the foregoing reasons, the decisions of the Benefits Review Board in Nos. 75-1659 and 75-2833 are REVERSED. The Board's decisions in Nos. 75-2289, 75-2317 and 75-4112 are AFFIRMED in all respects.